

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUN 16 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Sections 3(n)
and 332 of the Communications Act)

Regulatory Treatment of Mobile
Services)

GN Docket No. 93-252

MCI COMMENTS

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SUMMARY

In the following Comments, MCI shows that:

- The Commission's definition of CMRS is adequate, and a reclassification of an SMR is not appropriate.
- The question of whether providers of mobile service should be subject to further forbearance ought to be considered in other proceedings.
- Sweeping all CMRS offerings under Title II would be ill-advised.
- No additional rules are presently needed to allow incumbent CMRS providers to better compete with newly reclassified private carriers.
- An investigation into the structural separation requirements of Section 22.901 is not presently warranted.
- The Commission should withhold judgment on accounting and affiliated transaction guidelines until further review is performed.
- No evidence is presented which would warrant a ruling that states may not mandate CMRS-to-CMRS interconnection or unbundling.
- With the qualifications, mentioned herein, clarification of alien ownership limits may be appropriate.

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MCI COMMENTS

MCI Telecommunications Corporation (MCI) hereby provides its comments in response to petitions for reconsideration filed by various parties in this proceeding. To the extent MCI does not address specifically any position reflected in the petitions for reconsideration that were filed, its not doing so should not be interpreted to imply MCI concurrence in the positions taken.

I. CMRS Definitions

MCI disagrees with the assertion of the American Mobile Telecommunications Association (AMTA) that the Commission definition of CMRS is overboard and inconsistent with the intent of Congress.¹ The Commission's definition was supported by the vast majority of commenters in the CMRS proceeding, including MCI, and, MCI submits, properly reflects Congressional intent.

AMTA's request that "small business" CMRS providers be reclassified as "private" is inappropriate.² If "small

¹ AMTA Pet. Recon. at 1.

² Id. at 7-9.

business" CMRS providers are unreasonably burdened, the statute, as AMTA acknowledges in passing, provides a remedy.³ The Commission may adopt a policy of further forbearance, where appropriate, to classes of carriers.⁴ This issue is being considered by the Commission in Docket No. 94-33, and AMTA should pursue its request for relief there.

Finally, AMTA's suggestion that the Commission reclassify as private an SMR with 50,000 customers is not, as AMTA implies, comparable to the Commission's classification of small telephone companies.⁵ In the dispatch market, a single "customer" account could include tens, hundreds, or even thousands of mobile units.⁶

II. Forbearance Issues

GTE Service Corporation (GTE) seeks further elimination of what it perceives as unnecessary and burdensome regulation on providers of mobile public phone service. Specifically, GTE asks the Commission to forbear from

³ See Pub. L. No. 103-66, Title VI, 107 Stat. 312 (1993). See, also, AMTA pet. recon. at 7.

⁴ Id. at 8.

⁵ Id. at 7.

⁶ See Report and Order, In the Matter of Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, MD Docket No. 94-19, adopted June 3, 1994, released June 8, 1994, at 30-33, which treats differently mobile radio subscribers and subscribers of telephone access lines.

applying the Operator Service Provider/Aggregator provisions of Section 226 of the Communications Act to CMRS providers, citing as support for its position the absence of any complaints of "blocking" of IXC calls from mobile public phones.⁷ MCI believes that the question of whether providers of mobile public phone service should -- as a class -- be subject to further forbearance is one which should be made on a record developed in GN Docket 94-33, and not in response to a petition for reconsideration in this proceeding. GTE additionally claims that cellular carriers are disadvantaged vis-a-vis other carriers and other CMRS providers,⁸ are also more appropriately addressed in the further forbearance rulemaking.

GTE asks the Commission to clarify that all CMRS offerings, including auxiliary services -- even if otherwise "enhanced" -- are subject to Title II regulation with forbearance.⁹ GTE claims that this approach is necessary in order to minimize intrusive and burdensome state regulation.¹⁰ Granting GTE's request would be inconsistent with the underlying purpose of the Commission's enhanced services rules, which permit the offering of "enhanced services" without subjecting the provider therefore to Title

⁷ GTE Pet. Recon. at 1.

⁸ Id. at 7-8.

⁹ Id. at 1.

¹⁰ Id. at 12.

II regulation.¹¹ Moreover, GTE's request, which refers generally to all CMRS offerings¹² is too vague to permit a reasoned ruling on its request. Today, prospective CMRS providers, including Local Exchange Carriers (LECs), engage in the provision of a broad range of "auxiliary services" and products, many of which (information services, voice-mail, CPE, and billing and collection services) are today beyond the scope of Title II regulation. To sweep all auxiliary offerings or those deemed to be "enhanced" under Title II would be ill-advised, particularly in the absence of any factual record to support such an action.

McCaw Cellular Communications, Inc. (McCaw) asserts that the Commission should adopt rules giving incumbent CMRS providers, including cellular carriers, adequate flexibility to meet competition from newly reclassified private carriers, including flexibility to price services to meet individual customer needs.¹³ McCaw also asks the Commission to clarify that all CMRS providers have authority to utilize their licensed frequencies to provide service on a "private carriage" basis.¹⁴ McCaw also requests that the burden in complaint cases be shifted, such that a CMRS rate would not

¹¹ See Section 64.702 of the Commission's rules and Regulation, 47 C.F.R. § 64.702.

¹² Id. at 13.

¹³ McCaw pet. recon. at 12.

¹⁴ Id. at 15.

be held discriminatory or otherwise unlawful if other providers in the marketplace charge "similar" rates for "equivalent" services.¹⁵

McCaw's requests should be denied. This Commission has never engaged in price regulation of interstate cellular services, so it is difficult to fathom what additional pricing flexibility McCaw would need to meet competition from newly reclassified private carriers.

Moreover, under the new statutory framework, those formerly private carriers either are now or will soon be common carriers subject to forbearance, just like McCaw and all other cellular carriers. Even if the Commission could lawfully permit McCaw to engage in private carriage within the CMRS framework, it would be ill advised to do so at such an early date, absent marketplace experiences that disclose the public interest would be served by such a move. As the Commission itself has noted repeatedly, it has been unable to conclude that the cellular market is effectively competitive.

In a highly concentrated market such as cellular, where both the number of suppliers and available communications capacity are limited, "private carriage" authority is virtually certain to result in unreasonable price discrimination. Standing alone, private carriage authority in today's cellular market would result in substantial harm

¹⁵ Id. at 13-14.

to those consumers who represent "small accounts" and, by definition, lack the wherewithal to negotiate service arrangements that reasonably serve their interests. If private carriage rights were authorized simultaneously with the adoption of McCaw's proposed revised burden of proof in complaint proceedings, cellular carrier incumbents would obtain unwarranted and virtually unrestrained flexibility to charge smaller customers with little bargaining power all that the market would bear, while locking lucrative large accounts into long-term favorable rates in advance of competitive entry.

Finally, the Commission should consider the impact of private carriage authority on other Commission initiatives. Just last week, the Commission tentatively concluded that all cellular carriers should be required to provide equal access to interexchange carriers.¹⁶ AT&T has publicly pledged that McCaw will provide equal access if its proposed acquisition of McCaw is approved and consummated. The Commission is obligated to consider, given the substantial benefits that equal access provides, whether McCaw's conversion of some or all of its customers to private carriage would, or should, enable it to evade the "commitment" to equal access -- a common carrier obligation -- that AT&T has made on its behalf.

¹⁶ Notice of Proposed Rulemaking, CC Docket 94-54, adopted June 9, 1994.

The New York Department of Public Service (NYDPS), asserts that the Commission may not preempt state regulation of rates for intrastate interconnection offerings of CMRS providers.¹⁷ MCI agrees in principle with NYDPS, in that the Commission appears to have gone well beyond the authority conferred by Congress when, for example, it ordered the mandatory detariffing of "CMRS access." However, given the brevity of the NYDPS petition, the scope of NYDPS' opposition is not entirely clear. NYDPS clearly objects to preemption of state rate regulation of CMRS interconnection offerings if CMRS-to-CMRS interconnection is mandated.¹⁸ It is not clear that NYDPS shares MCI's view that mandatory detariffing of all CMRS access offerings -- and not merely those which are encompassed in CMRS-to-CMRS interconnection -- exceeds the Commission's authority.

III. LEC/CMRS Subsidiary Separation

Ameritech asks the FCC to initiate a further proceeding to investigate whether "structural separation" requirements of Section 22.901 should continue to be imposed, citing the "competitive nature" of the CMRS marketplace as the premise for discontinuing the requirement.¹⁹ The Commission has already pledged to examine this issue in a follow-up

¹⁷ NYDPS pet. recon. at 3.

¹⁸ Id.

¹⁹ Ameritech pet. recon. at 3.

rulemaking, which should be initiated in the near future. It would be inappropriate, therefore, to address this issue, at this stage of this proceeding because interested parties have not had adequate notice and an opportunity to comment on the question.

In any event, there is no record to support any lifting of the restriction at this time. Although Ameritech claims that CMRS is already competitive,²⁰ the Commission has been unable to find that cellular -- which today accounts for the vast majority of CMRS subscribers and revenues -- is "fully competitive."²¹ In this regard, the Commission recently pledged to institute a monitoring proceeding to gather information on the state of competition in cellular.

Structural separation requirements should not be lifted in anticipation of competitive entry; the Bell Operating Company's (and other major LECs with in-region cellular interests) have the ability and incentive to impede the entry of CMRS competition, to overcharge for access and interconnection, and to discriminate unreasonably in the quality and types of service provided to competitors. Therefore, structural separation requirements cannot be lifted prematurely.

²⁰ Id. at 2.

²¹ See, generally, In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act. Regulatory Treatment of Mobile Services, GN Docket No. 93-252, adopted Feb. 3, 1994, at 54-62.

Pacific Bell asks the Commission to clarify that, when a LEC opts to provide (regulated) CMRS through a separate (regulated) subsidiary, the Part 64 cost allocation and affiliate transaction rules should not apply as between the LEC and its PCS subsidiary, but only to the relationship between the regulated service providers and unregulated affiliates.²² Pacific Bell also asks that the Commission clarify that a subsidiary of a LEC providing CMRS is not required to adopt the Part 32 Uniform System of Accounts.²³ Pacific Bell asserts that its PCS Safeguards plan, when filed, will provide further information on the accounting safeguards and affiliate transactions guidelines between the PCS subsidiary and Pacific Bell, and will demonstrate that appropriate separation will be maintained at all times.²⁴

It is impossible to assess whether the accounting safeguards and affiliate transaction guidelines to be proposed in Pacific Bell's PCS Safeguards plan will be adequate. While "structural separation," as a general rule, facilitates detection of cross-subsidization and other forms of abuse, the term has been used to describe a wide range of corporate structures, including some which practice separation in name only. MCI believes that the Commission should withhold judgment on whether its existing accounting

²² Pacific Bell pet. recon. at 2.

²³ Id. at 5.

²⁴ Id. at 4.

safeguards and affiliate transaction guidelines are appropriate in the CMRS context until such time as the Commission and interested parties have had an opportunity to review and comment upon the PCS Safeguards plans of Pacific Bell and other similarly situated companies.

IV. Interconnection/Access

McCaw, like MCI, requests that the Commission clarify that the LECs' mutual compensation obligation and their obligation to negotiate in good faith apply to intrastate as well as interstate interconnection.²⁵ Today most cellular service is intrastate in nature; the intrastate nature is expected to also characterize CMRS traffic in the future. Therefore it is imperative that principles of mutual compensation be mandated for both interstate and intrastate traffic if competition is to be fully promoted.

McCaw asks the Commission to rule that states may not mandate CMRS-to-CMRS interconnection or mandate unbundling pending completion of Commission review.²⁶ The National Association of Regulatory Commissioners (NARUC), asks the opposite, namely, that the Commission clarify that all issues related to CMRS interconnection (including jurisdictional issues and unbundling) remain open pending the conclusion of the proceeding resulting from the

²⁵ McCaw pet. recon. at 5.

²⁶ Id.

Commission's notice of inquiry on interconnection.²⁷ MCI submits that McCaw has not demonstrated need for the relief it is seeking. As a general matter, the initiation of Commission inquiry on this or any other topic is no impediment to action in those states which have already commenced rulemakings on these topics, nor is it apparent that many such state proceedings are underway. MCI does not anticipate that many state commissions will devote significant resources to CMRS-to-CMRS interconnection issues until interested parties -- principally new entrants to CMRS -- raise these issues at the state level.²⁸

Unlike state commissions, this Commission is obligated to move expeditiously to address the interconnection rights and obligations of CMRS providers, not just vis-a-vis LECs, but also with one another. Without an "equal terms" requirement, the LECs have the motivation and the market power to impede CMRS entrants substantially. The Commission should therefore consider mandating a condition of "under terms no less favorable" than what LEC provide each other with regard to interconnection.²⁹ More generally, the scope

²⁷ NARUC pet. recon. at 3.

²⁸ Those states which do adopt CMRS-to-CMRS interconnection requirements or mandatory unbundling of CMRS offerings will, of course, be well advised to consider the likelihood of federal preemption, should the Commission adopt a different set of requirements for application on a nationwide basis.

²⁹ The term should be read to include rates and type of services.

of interconnection and access rights and obligations should be established as soon as possible.³⁰

V. Clarifications

McCaw asks the Commission to clarify that state regulatory authority over "other terms and conditions" does not permit a state to require CMRS providers to file "informational" tariffs. MCI does not believe such a "clarification" is necessary or appropriate at this time. Tariff rules, both substantive and procedural, vary widely from state to state. It is not clear that any state which required CMRS providers to file "informational" tariffs would be abusing its authority with regard to imposing "other terms and conditions," nor is it at all clear that a requirement to file informational tariffs would amount to erecting impermissible entry barriers or engaging in the unlawful regulation of CMRS rates.

CUE Network Corporation (CUE) and SEIKO Telecommunication Systems, Inc. (SEIKO), operators of FM

³⁰ National Cellular Resellers Association (NCRA), asserts that the Commission is obligated to adopt final rules by August 10 of this year. (See NCRA pet. recon. at 10.) Interconnection is likely to account for a substantial portion of system construction and operating costs. By addressing these issues expeditiously, the Commission can begin the process of informing prospective operators of the expected magnitude of these costs. MCI agrees that the Commission should avoid further delay in addressing the question of CMRS-to-CMRS interconnection rights and obligations. MCI is pleased that the Commission voted on June 9, 1994 to initiate a proceeding in which this issue and other related issues will be addressed.

subcarrier paging systems, ask the Commission to clarify that alien ownership limits do not apply to providers of FM subcarrier paging systems, which hold "authorizations" but not "licenses."³¹

Although MCI has no quarrel with the basic thrust of the CUE and SEIKO petitions, MCI urges the Commission to tailor carefully any relief it grants here. The term "authorization" has been used in numerous services other than FM subcarrier paging and, in some contexts, denotes an award which can be converted into a radio station license by completion of construction or by commencement of commercial operation. The Commission should not adopt any rule change that would have the effect of permitting those who are not qualified to hold a license to acquire "authorizations" -- either through the competitive bidding process or some other Commission process -- for the purpose of trafficking in those "authorizations" for a quick profit in the secondary market before the "authorizations" become "licenses."

³¹ CUE pet. recon. at 3; SEIKO pet. recon. at 1-2.


VI. Conclusion

WHEREFORE, MCI respectfully requests that the Commission consider these comments in deciding the matters before it on reconsideration.

Respectfully submitted,

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I Karen Dove, hereby certify that on this 16th day of June, 1994, copies of the foregoing "**COMMENTS**" in GN Docket No. 93-252 were served by first-class mail, postage prepaid upon the parties on list below, except as otherwise indicated.

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